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No. 08-87

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IN THE

Supreme Court of the United States

REINSURANCE RESULTS, INC.,

Petitioner,

v.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether judicial factfinding in furtherance of construing an unambiguous contract under state law is an action that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Indiana Lumbermens Mutual Insurance Company respectfully states that it has no parent corporation, and that no publicly held corporation owns ten (10%) percent or more of its stock.

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STATEMENT OF THE CASE

Indiana Lumbermens Mutual Insurance Company ("ILM") is an insurer who transfers a portion of its risk to reinsurers by paying premium in exchange for reinsurance. (Pet. App. at A-14.) In 2000, ILM made a decision, with the approval of its auditor, to change its accounting policy regarding the premium cost of its reinsurance policies. Rather than treat the full premium cost as an expense in the calendar year in which ILM paid the premium (as ILM had done in the past), ILM elected to expense a proportionate amount of its premium cost in each month in which its reinsurance policy was in effect (i.e., to defer recognition of reinsurance premium expense over the term of the underlying policy risk), and to reflect the balance of the premium expense not as an expense, but as a prepaid asset. (*Id.* at A-2 – 3.) This change (the "2000 Accounting Policy Change") created a prepaid asset account on ILM's balance sheet, but also reduced the amount ILM could recover from its reinsurers under its reinsurance policies. (*Id.* at A-3 – 4.)

On November 29, 2004, ILM and Reinsurance Results, Inc. ("RRI") entered into a one-page Service Agreement (the "Agreement"). Thereunder, RRI agreed to "review [ILM's] historical reinsurance premium and claims cessions" and to "provide [ILM] with a report detailing any premium and/or claims identified during the course of the review that have been processed in accordance with the reinsurance contract terms and conditions." (*Id.* at A-16.) "RRI's fee for these services was set at 33% of the 'Net Funds' collected from ILM's reinsurers as a result of this review." (*Id.*)

On or about December 1, 2004, RRI sent ILM a memo questioning the propriety of ILM's prepaid reinsurance premium asset (created as a result of the 2000 Accounting Policy Change). (*Id.* at A-16 – 17.) ILM responded by describing its 2000 Accounting Policy Change to RRI. (*Id.* at A-17.) RRI replied by suggesting that ILM could obtain additional recoveries from its reinsurers if it reversed the 2000 Accounting Policy Change. (*Id.*)

In January 2005, ILM's auditor recommended that ILM should revert to the accounting policy that it had in place prior to the 2000 Accounting Policy Change. (*Id.*) ILM followed its auditor's recommendation and, as a result, was required to eliminate its prepaid reinsurance premium asset and was able to recover additional amounts from its reinsurers. (*Id.* at A-5.) In substance and effect, ILM simply reversed the operation of the 2000 Accounting Policy Change. The parties dispute whether the Agreement provides RRI with a right to recover 33% of those additional amounts from reinsurers.

On October 27, 2006, the United States District Court for the Southern District of Indiana granted summary judgment in favor of ILM on RRI's breach of contract claim.[1] It found that the terms of the Agreement were unambiguous (as contended by both parties) and thus applied Indiana law to construe the Agreement as a matter of law. (*Id.* at A-20, A-22 – 23.) The district

[1] RRI abandoned its promissory estoppel claim and did not seek appellate review of the district court's denial of its *quantum meruit* claim.

court found that "the Agreement's scope is limited to a review of ILM's historical premiums and claim cessions in light of the terms and conditions of ILM's reinsurance treaties"; that RRI failed to identify "any evidence regarding how review of the accounting method was specified within the contract terms and conditions"; and that the Agreement did "not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of [the expense of] reinsurance premiums." (*Id.* at A-24 – 25.)

RRI appealed the district court's judgment to the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment on January 16, 2008. The Seventh Circuit found that, to the extent RRI conferred any benefit upon ILM, the Agreement is "specific and clear" that any such conferral was not compensable under the Agreement—that is, "it was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (*Id.* at A-7 – 8.) Indeed, RRI "rendered a service outside the contract[.]" (*Id.* at A-10.) The Seventh Circuit noted that RRI "might have drafted the [Agreement] more broadly—might have inserted a provision entitling [RRI] to be compensated for any advice it gave [ILM] that the latter took[,]" but, absent such a provision, found that RRI "really is seeking more than it bargained to receive." (*Id.* at A-12.) Following the Seventh Circuit's decision, RRI filed its Petition.

REASONS FOR DENYING THE PETITION

The two courts below correctly interpreted under Indiana law the terms and conditions of a one-page contract for the niche service of reinsurance processing review. The district court and the Seventh Circuit have each have construed the terms of that contract based on the designated evidence before them, and both have determined as a matter of law that RRI is seeking and is not entitled to recover compensation for performing services beyond the scope of the unambiguous contract it drafted. Those courts respectively granted and affirmed summary judgment in favor of ILM based on their resolutions of that question of law.

RRI does not challenge the identical legal determination of the two courts below, and has not identified a compelling reason for this Court to exercise its discretion to grant RRI's Petition. RRI contends that only one of the considerations governing review on certiorari set forth in Supreme Court Rule 10 is implicated by the decisions of the courts below: a "depart[ure] from the accepted and usual course of judicial proceedings [*see* Sup. Ct. R. 10(a)] by ignoring established case law regarding a Rule 56 motion for summary judgment." (Pet. at 8-9.) Specifically, RRI identifies four facts that it believes were both material to the grant of summary judgment and in dispute, and contends that both courts below erroneously found each of the four facts to be undisputed. (*Id.* at i, 5-8.) In fact, none of those four facts were material to the courts' decisions. RRI's Petition should be denied for this reason alone.

Even if any of the four facts RRI identifies were material, this Court would violate its own "two-court rule" were it to re-find facts for a third time. Further, if this Court took that step, it would find that none of the two lower courts' findings were clearly erroneous based on the designated evidence before them (and on RRI's failure to designate evidence bearing on the findings it challenges). Moreover, the propriety of the courts' factfinding in this contract dispute in a niche industry is not an issue of concern to the public. Ultimately, judicial factfinding is a routine occurrence and is not "a departure from the accepted and usual course of judicial proceedings." For all of the reasons herein, this Court should deny RRI's Petition.

A. None of the Four Facts Identified in RRI's Petition Are Material to the Two Lower Courts' Resolution of an Outcome Determinative Question of Law.

The only question RRI presents for this Court's review is the propriety of the two lower courts' findings of material fact. There is no compelling reason for this Court to review these challenged findings of fact because none of them were material to the lower courts' respective decisions to enter and affirm summary judgment in favor of ILM. Indeed, RRI's Petition fails to challenge an outcome determinative legal conclusion independently reached by the two courts below—that is, that RRI's activities exceeded the unambiguous scope of the Agreement it drafted such that it is not entitled to the compensation it seeks.

At its core, this dispute centers around RRI's desire to be compensated for reviewing the propriety of a statutory accounting policy knowingly adopted by ILM, with the approval of ILM's auditor. (Pet. App. at A-2 – 3.) However, the Agreement is clear that RRI did not bargain to be compensated for that activity, but only in the event ILM recovered "Net Funds" from reinsurers as a result of RRI's "review [of] [ILM's] historical reinsurance premium and claims cessions."

Both courts below construed these unambiguous contract terms as a matter of Indiana law. (*See id.* at A-7, A-20.) The district court considered the testimony of ILM's expert regarding the meaning of certain terms in the Agreement as used within the reinsurance review industry. (*Id.* at A-23.) The district court held that "the unambiguous terms of the Agreement do not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of [the expense of] reinsurance premiums. Further, RRI has not set forth any evidence regarding how review of the accounting method was specified within the contract terms and conditions." (*Id.* at A-24 – 25.)

The Seventh Circuit held the same—that the Agreement is "specific and clear" that any benefit conferred by RRI's review of ILM's accounting policies "was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (*Id.* at A-7 – 8.) Indeed, the court held that RRI "rendered a service outside the contract[.]" (*Id.* at A-10.) It reasoned that RRI "might have drafted the [Agreement] more broadly—might have inserted a provision entitling [RRI] to be compensated for any advice it gave [ILM] that the latter

took[,]" but, absent such a provision, RRI "really is seeking more than it bargained to receive." (*Id.* at A-12.)

The foregoing demonstrates that none of the facts that RRI identified in its Petition are material to the lower courts' construction of the compensable scope of RRI's review as a matter of Indiana law. Whether RRI identified a "processing error," whether ILM benefitted from RRI's advice, or whether Statement of Statutory Accounting Principles No. 62 changed after the year 2000, are issues that have no bearing on whether RRI was entitled to be compensated for *reviewing ILM's statutory accounting policies* under an Agreement that only provided RRI with a contingent right of compensation based on its findings following a *review of ILM's "historical premium and claims cessions."* The two courts below both found that RRI's review exceeded the scope of the Agreement it drafted, and that RRI was not entitled to the compensation it seeks. RRI failed to challenge that legal determination in its Petition. As such, there is no compelling reason for this Court to re-review the propriety of findings of fact immaterial to the lower courts' decisions.

B. There Is No Compelling Reason for This Court to Review the Factfinding of Two Lower Courts.

The only question RRI presents for this Court's review is the propriety of two lower courts' findings of material fact. Even if any fact identified by RRI was material, this Court's Rules and precedent make clear that it does not convene to re-find facts in cases like the

present. This case implicates the interests of only the two captioned parties, does not feature an issue of constitutional significance, and is not so compelling to justify this Court's violation of its own "two-court rule." RRI's Petition should thus be denied.

This Court's Rules and precedent presume that the issues that RRI presents are not "compelling." Supreme Court Rule 10 provides: "A petition for a writ of certiorari is rarely granted when the asserted error consists of *erroneous factual findings* or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. (emphasis added).

Further, this Court has previously alerted litigants that it does not sit to review judicial factfinding in cases like the present—that is, those not involving a constitutional claim that may depend on the resolution of purported issues of material fact. In *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967), the petitioner requested this Court to reject as "clearly erroneous" a factual conclusion reached by the district court and accepted by the court of appeals. This Court refused to consider the matter for a principled reason: "In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Id.* at 635 (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below

in the absence of a very obvious and exceptional showing of error.")). "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Id.* at 636.

In this case, RRI asks this Court to violate its own "two-court rule." Both the district court and the Seventh Circuit below reviewed the record before them, found material facts, and determined that RRI was not entitled to recover under the Agreement. Assuming *arguendo* that the four findings identified by RRI were material to those determinations, none of the findings were clearly, obviously and exceptionally erroneous.

First, RRI disputes the two lower courts' findings that RRI failed to identify a "processing error" when it reviewed ILM's statutory accounting policies and recognized the 2000 Accounting Policy Change knowingly adopted by ILM. RRI's burden was to submit evidence that it identified an instance in which ILM failed to process premium or claims "in accordance with the reinsurance contract terms and conditions" during its review of ILM's "historical reinsurance premium and claims cessions." (*See* Pet. at 6-7 ("Processing of Claims").) The courts below uniformly found that RRI failed to meet its burden.

The two lower courts reviewed the terms and conditions of the reinsurance contract at issue (the Aggregate Excess of Loss treaty) and each determined that ILM correctly "processed" "historical reinsurance premium and claims cessions" in accordance therewith. The district court found that "RRI [did] not direct[] the

Court to any of ILM's reinsurance contract terms or conditions that might require them to utilize a particular accounting method for the deferral of premiums." (Pet. App. at A-24.) It further rejected RRI's "simplistic" argument that "the definition of accounting soundly fits within the broader definition of process" as "contradicted by the express language of the contract." (*Id.*) Ultimately, it found that RRI failed to address ILM's arguments regarding the industry meaning of the phrases used in the Agreement with any evidence. (*Id.*) The district court's finding that RRI failed to identify an instance in which ILM failed to properly process premium or claims "in accordance with the reinsurance contract terms and conditions" could not have been clearly erroneous when RRI failed to meet the evidentiary burden imposed on it by Federal Rule of Civil Procedure Rule 56(e).[2]

For its part, the Seventh Circuit found in no uncertain terms that "[t]he claims that the insurance company submitted to its reinsurers were correctly

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[2] Federal Rule of Civil Procedure Rule 56(e) provides,

> "When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, *its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.*"

Fed. R. Civ. P. 56(e) (emphasis added).

processed. Nothing in the terms of its reinsurance contracts requires it to use one method of accounting rather than another." (Pet. App. at A-7.) The decision to choose one accounting policy over another "was a decision internal to the insurance company; it had nothing to do with the terms of the reinsurance contracts." (*Id.* at A-8.) ILM's decision was not a failure to process premium or claims "in accordance with reinsurance contract terms and conditions." (*See id.*)

Second, RRI erroneously contends that the Seventh Circuit *concluded* that ILM did not benefit from RRI's review of ILM's statutory accounting policies and recognition of the 2000 Accounting Policy Change knowingly adopted by ILM. (Pet. at 7 ("'No Benefit' to ILM").) The Seventh Circuit reached no such conclusion. Rather, it found that "[RRI's] discovery of the 2000 accounting maneuver and its recommendation that [ILM] abandon it *may* have benefited [ILM]. But it was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (Pet. App. at A-8 (emphasis in original).) Thus, the Seventh Circuit made no finding on the issue and, even if it did, that finding was clearly not material to its decision to affirm the district court's entry of summary judgment against RRI.

Third, RRI contends that Statement of Statutory Accounting Principles No. 62 ("SSAP 62") did not change subsequent to the 2000 Accounting Policy Change. (Pet. at 7-8 ("Accounting Standard 62").) Whether it did or did not was not material to the decisions of two

courts below. (ILM designated evidence that it did.[3]) The district court never referenced SSAP 62 in its opinion. The Seventh Circuit notes that ILM's auditor advised ILM to revert to its pre-2000 accounting policy because of a change to SSAP 62. (Pet. App. at A-5.) However, neither the fact that ILM followed its auditor's advice nor the reason therefor (be it a change in SSAP 62 or otherwise) has any relevance to the primary grounds for the courts' decisions—that RRI did not bargain to be compensated to review ILM's statutory accounting policies and, in any event, failed to identify any instance in which ILM failed to properly process premium or claims "in accordance with the reinsurance contract terms and conditions."

Fourth, RRI again contends that it found a processing error. (Pet. at 8 ("Accounting Change").) As discussed *supra*, the two lower courts' findings to the contrary were correct and not clearly erroneous.

In short, RRI has not identified any "very obvious and exceptional showing of error" as would be required for this Court to violate its "two-court rule." *See Graver Tank*, 336 U.S. at 275. There is no compelling reason for this Court to find facts for the third time in this case. Indeed, even if the two courts below *both* clearly erred in their findings of material fact (which they did not), this Court's discretionary review "depends on numerous

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[3] ILM proffered testimony that its auditor "determined that it was proper for ILM to revert to the statutory accounting policy ILM originally had in place for FY 1999 (prior to the change in 2000) due to a change to a statutory accounting rule (Statement of Statutory Accounting Procedures 62) in a year subsequent to 2000." (Supplemental Appendix 041 ¶ 24.)

factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

As previously noted, RRI has not identified any embarrassing conflict of opinion between circuit courts of appeals. RRI has conceded that its only contention is that the lower courts' factfinding "departed from the usual and accepted course of judicial proceedings." As explained *supra*, it is only a rare instance when this Court would agree to sit to re-review the factfinding of two lower courts (e.g., when the facts at issue implicate a potential constitutional deprivation). And that instance is not present in this case.

Moreover, only the parties to this dispute have an interest in its outcome—RRI's in being compensated for performing activities outside the scope of the Agreement and ILM's in proving that it had no obligation to compensate RRI for such activities. Whether RRI is adjudged to be seeking to receive more than it bargained to receive under the Agreement (*see* App. at A-12) is of no concern to the greater public.

In summary, none of the factors this Court considers when evaluating whether to grant a petition for a writ of certiorari is present in this case. Under this Court's Rules and precedent, an alleged error in factfinding by two lower courts is not a compelling reason for granting a petition for a writ of certiorari. Sup. Ct. R. 10; *Berenyi*, 385 U.S. at 635. Thus, RRI's Petition should be denied.

CONCLUSION

RRI has not identified any compelling reason for this Court to exercise its discretion to grant RRI's Petition for a Writ of Certiorari. ILM respectfully requests this Court to deny RRI's Petition, and to further award all other just and proper relief.

Respectfully submitted,

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